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NO. 91, Original

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF WEST VIRGINIA,

Defendant.

ACTION IN ORIGINAL JURISDICTION

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

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STATE OF WEST VIRGINIA

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I.

QUESTION PRESENTED

Does a claim for loss of opportunity for revenue associated with a dispute as to the terms of an executory contract entered into by the athletic departments of two state supported universities in separate states present a threat to the interests of the plaintiff state in its capacity of quasi sovereign so that invoking the original jurisdiction of this Court is appropriate?

II.

PARTIES

The plaintiff is the State of California, and the defendant is the State of West Virginia.

III.

STATEMENT OF THE CASE

The statement of the case made by the State of California is acquiesced to generally for its recitation of the facts as presented. However, exception is taken to the omission of one crucial fact.

California has failed to inform the Court that the alleged contract contained an escape clause:

> "8. It is recognized that neither party can foresee the exigencies which may hereafter arise by reason of emergency, catastrophe or epidemic making it necessary or desirable, in the judgment of West Virginia University or San Jose State University, to cancel this agreement. Any financial obligations for the promotion of this contest made by either party prior to the date of cancellation of this contract shall be shared equally by the parties of this agreement." (Emphasis supplied.)

West Virginia merely exercised its rights under the contract. There has been no resort to unilateral rescission of the agreement.

IV.

SUMMARY OF ARGUMENT

1. Before a plaintiff state may invoke the original jurisdiction of this Court, the plaintiff state must show there exists a serious and imminent threat of injury to the interest of the state in its capacity of quasi sovereign and the redress of which requires the action of the United States Supreme Court as a matter of absolute necessity.

2. The activity in which California was engaging--the carrying on of a major intercollegiate football program with the scheduling of games on opposite sides of the continent--is not an interest of the plaintiff state which is of

necessary significance to invoke the original jurisdiction of the United States Supreme Court.

3. The interest sought to be protected by California is not substantial, and as California seeks to recover for the loss of opportunity for revenue it is highly speculative. This Court need not act as a matter of absolute necessity to protect California.

4. The invoking of the original jurisdiction of this Court is not mandated. The interest of California sought to be protected is not that of the quasi sovereign, is of relative insignificance, and is speculative in nature. Contrary to the assertions of California, this Court has not previously heard a dispute of this nature.

5. A satisfactory alternative forum exists where the plaintiff state

may seek redress of its grievance. In light of the existence of this alternative forum, this Court need not act as a matter of absolute necessity.

V.

ARGUMENT

The State of California is attempting to make this Honorable Court the arbitrator of an agreement to play an intercollegiate football game. California claims an interest of the sovereign is endangered. But the arguments, points and authorities relied on by California do not disguise the fact that the transaction at issue deals with nothing more substantial than the alleged loss of revenue associated with the cancellation of an intercollegiate sporting event. Does the United States Constitution, Article III, Section 2, Clause 2, and 28 U.S.C. § 1251(a)(1)

which implements it, require this Court to take jurisdiction of controversies of this nature?

California, as the plaintiff state, bears the burden of alleging facts in its complaint which are clearly sufficient to support a decree in its favor. Alabama v. Arizona, 291 U.S. 286, 78 L. Ed. 798, 54 S. Ct. 399 (1934). This burden goes beyond the mere prima facie representation that a cause of action recognized at law is applicable to the dispute. The plaintiff state must establish that the injury complained of is to its sovereign interest.

This prudent limitation over the extension of original jurisdiction arises from the recognition of the special nature of conflicts that may develop between states in a federal system. The nature of the disputes

between states contemplated for resolution by the Supreme Court is limited to those which would arise from an injury to a state in its capacity of quasi sovereign, and if occurring between states entirely independent would properly be the subject of diplomatic adjustment. North Dakota v. Minnesota, 263 U.S. 365, 68 L. Ed. 342, 44 S. Ct. 138 (1923). Thus, states are not free to resort to the Supreme Court for every controversy for which a private individual might be free to seek judicial intervention. Alabama v. Arizona, supra; Colorado v. Kansas, 320 U.S. 383, 88 L. Ed. 116, 64 S. Ct. 176 (1943). In respect of the wisdom of the foregoing limitation, each individual case must be examined to determine if, in fact, it presents a serious and imminent threat of injury to the interest

of one state in its capacity of quasi sovereign which has been caused by the action of another state, and the redress of which requires the action of the Supreme Court as a matter of absolute necessity.

Original jurisdiction of the Supreme Court extends to controversies between states of the Union. Monaco v. Mississippi, 292 U.S. 313, 78 L. Ed. 1282, 54 S. Ct. 745 (1934). Before a state may sustain an action against another, the plaintiff state must first demonstrate that the injury for which redress is sought was directly caused by the actions of another state. Pennsylvania v. New Jersey, 426 U.S. 660, 49 L. Ed. 2d 124, 96 S. Ct. 2333 (1976); Massachusetts v. Missouri, 308 U.S. 1, 84 L. Ed. 3, 60 S. Ct. 39 (1939). The power exerted by the Supreme Court in

such disputes is extraordinary and will not be exercised unless the threatened injury is clearly shown to be of serious magnitude and imminent. Alabama v. Arizona, supra; Connecticut v. Massachusetts, 282 U.S. 660, 75 L. Ed. 602, 51 S. Ct. 286 (1931); Washington v. Oregon, 297 U.S. 517, 80 L. Ed. 837, 56 S. Ct. 540 (1936); Colorado v. Kansas, supra, reh. denied, 321 U.S. 803, 88 L. Ed. 1089, 64 S. Ct. 633 (1944). And, in respect of controversies between states, the jurisdiction of the Court will not be exerted in the absence of absolute necessity. Alabama v. Arizona.

The first dispute between states decided under the United States Supreme Court's original jurisdiction was New York v. Connecticut, 4 Dall. 3, 1 L. Ed 715 (1799), a dispute over title to land claimed by both states. In a series of

cases from New Jersey v. New York, 5 Pet. 285, 8 L. Ed. 127 (1831), to Nebraska v. Iowa, 406 U.S. 117, 31 L. Ed. 2d 733, 92 S. Ct. 1379 (1972), original jurisdiction has been invoked for the determination of boundary disputes between states. Concerning as they do, the territorial sovereignty of states, cases of this nature represent the majority of decisions in original jurisdiction.

Resorting to this Court for equitable or injunctive relief has been held a proper instance for the taking of jurisdiction. Jurisdiction has been found proper in situations in which there has been interference with, or division of, waters flowing from one state into another, Connecticut v. Massachusetts, supra; Nebraska v. Wyoming, 325 U.S. 589, 89 L. Ed. 1815,

65 S. Ct. 1332 (1945); abatement of interstate pollution Vermont v. New York, 406 U.S. 186, 31 L. Ed. 2d 785, 92 S. Ct. 1603 (1972); and, sewage disposal by one state affecting the health of the citizens of another state. Missouri v. Illinois, 180 U.S. 208, 45 L. Ed. 497, 21 S. Ct. 331 (1901); New York v. New Jersey, 256 U.S. 296, 65 L. Ed. 937, 41 S. Ct. 492 (1921). In this line of cases the interest of the sovereign in protecting the safety and health of its citizens is readily apparent.

The two areas of controversy just discussed exemplify the special nature of the sovereign interest of states which the original jurisdiction of the Supreme Court was established to protect. Although this Court has heard disputes in other areas, the common thread throughout has been that an

interest of the plaintiff state recognized by this Court as sovereign was exposed to injury unless this Court exercised its power. Pennsylvania v. West Virginia, 262 U.S. 553, 67 L. Ed. 1117, 43 S. Ct. 658 (1923); Texas v. Florida, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 513 (1939). That common thread is lacking in the California complaint. The invocation of original jurisdiction would not be appropriate for the interest in controversy in the instant case.

Representations have been made that the respective governing bodies charged with administering the institutions of higher learning whose athletic departments entered into the disputed contract are instrumentalities of their respective states. This is a conclusion with which this Court would appear to concur. Arkansas v. Texas, 346 U.S. 368, 98 L.

Ed. 2d 80, 74 S. Ct. 109 (1953). California is attempting to extend this proposition to allege that any activity attributable to these governing bodies, such as the activity of an intercollegiate athletic department is, per se, of such consequence and importance that whenever a dispute arises between the athletic departments of state supported universities, the dispute must be resolved in the United States Supreme Court. This proposition is neither conclusive nor persuasive that the instant controversy between the athletic departments of West Virginia University and San Jose State University must be resolved in this Court.

Unlike the cases discussed in the foregoing recital of the history of this Court's invoking of its original jurisdiction, the instant case is in comparison

a triviality. Giving rise to the dispute is a contract to play two football games on opposite sides of the continent. The contract has a cancellation clause which one of the parties invoked and to which act the other objects.

Since the cancellation of the contract, San Jose State University has obtained a substitute opponent for one of the terminated games. Otherwise, San Jose State University made demand on West Virginia University for the sum of One Hundred Thousand ($100,000.00) Dollars. But of this amount, less than Five Thousand ($5,000.00) Dollars has been designated by California to be actual out-of-pocket expense.

Other than this insignificant sum, for which West Virgnia has tendered compensation,[1/] the claim of California

1. West Virginia University made a public offer to San Jose State University to pay the sum of Twenty-eight Thousand Fifty ($28,050.00) Dollars in settlement of this dispute.

is for loss of potential revenue. And as it pertains to perceived loss of opportunity for revenue, the claim has its foundation in estimate and speculation.

The injury alleged by California, based primarily on speculation and estimate and to only a minimum extent on actual cost, is neither in amount prayed for nor in its alleged impact serious in magnitude or imminent in occurrence. Alabama v. Arizona, supra; Connecticut v. Massachusetts, supra; Washington v. Oregon, supra; Colorado v. Kansas, supra. Unlike disputes of the nature contemplated in North Dakota v. Minnesota, supra, the instant case would be a doubtful candidate for settlement by diplomatic adjustment. The rule set forth in that case was in recognition of the fact that this nation is a federation of states which, even in forming

the Union, retained a great deal of independent authority. In exercising this authority states may come into conflict. But with the growth and development of this nation, the several states have embarked on activities not contemplated at the formation of the Union. The carrying on of an intercollegiate athletic program is such an activity.

The contracting for football games is not an activity which is within the sole province of the states' authority. Neither is it an activity which must be engaged in by two states. Both West Virginia University and San Jose State University contract for the playing of football games with privately chartered institutions of higher learning. It is only by an accident of the marketplace in the making of the contract that the

parties are construed as states, thus allowing the plaintiff to seek to invoke the jurisdiction of this Court.

If the present dispute arose between San Jose State University and Stanford University, a private institution of higher learning now on San Jose's schedule, there is no question that resort to this Court would be inappropriate. The instant dispute, although involving two state supported universities, is of no greater magnitude than the preceding example. Neither San Jose State University nor West Virginia University in entering into the contract was exercising the independent authority of their respective states in a manner contemplated by North Dakota v. Minnesota, supra.

California, in asking the Court to take jurisdiction in this dispute is, by

implication, asking the Court to throw open its doors and become a tribunal for the resolution of every dispute, no matter how trivial or insignificant, that may in some remote manner arise between states of the Union. With the ever increasing expansion of states into more and more activities, both within and without territorial boundaries, the number of conflicts which could come before this Court may be great.

The history of the extension of the original jurisdiction of this Court consists of a case by case evaluation of the necessity and propriety of the exercise of that jurisdiction. Indeed, this Court in other circumstances has not hesitated to distinguish the activities of both states of the Union, Employees v. Missouri Public Health Dept., 411 U.S. 279, 316 L. Ed. 2d 251,

93 S. Ct. 1614 (1973); National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), (distinguishing activities of a state which are or are not subject to federal control under the Commerce Clause, United States Constitution, Article I, § 3, cl. 2), and foreign states. Alfred Dunhill of London, Inc. v. Cuba, 425 U. S. 682, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976), (distinguishing circumstances for proper application of "act of state" doctrine). Continuing in that tradition by refusing to invoke original jurisdiction in the instant case would be appropriate and would not prejudice the rights of California.

San Jose State University would not be denied a tribunal if this Court declined jurisdiction, but would merely be placed in the circumstances of a

private institution of higher learning that has entered into a similar agreement.[2/] Although California argues that an appropriate state tribunal is foreclosed by virtue of language in Kentucky v. Indiana, 281 U.S. 163 at 165, 74 L. Ed. 784, 50 S. Ct. 275 (1930), the issue in that case involved a third

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2. Although recognizing complete immunity from suit in its own courts by virtue of West Virginia Constitution, Article VI, § 35, West Virginia provides a tribunal for determination and payment of claims against the State. This tribunal is the West Virginia Court of Claims. The establishment, jurisdiction, authority and procedure of this tribunal is set forth in West Virginia Code 14-2-1 et seq. The West Virginia Court of Claims is accessible to California in the same manner that it would be to a private institution of higher learning. Long ago this Court recognized that there are circumstances in which a state would take on the character of a private citizen to seek judicial determination of a claim. Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. Ed. 437 (1829). This circumstance, a claim for the payment of money, is appropriate for that determination.

party suit by citizens of Indiana, in the courts of that state, challenging Indiana's authority to enter into the contract with Kentucky. Unlike the question here, which is purely one of monetary compensation, the issue in Kentucky v. Indiana, supra, dealt with a determination of state law and statutory authority. The impropriety of having the validity of a contract subject to conflicting decisions in the courts of two states is readily apparent. But, when the issue is restricted to what, if anything, is the measure of monetary compensation, seeking a determination in a state tribunal is appropriate and not prejudicial to either party.

Additionally, California cites Kentucky v. Indiana, supra, for the proposition that a contractual dispute between states is a proper area for

granting jurisdiction. But this interpretation of the case is incorrect to the extent that it is suggested as authority for granting original jurisdiction in the instant case.

The contract at issue in Kentucky v. Indiana, supra, was of a kind and character so far removed from the one entered into in the instant case that comparison is difficult. Kentucky and Indiana had entered into an interstate compact to build a bridge between cities of the two states. The United States Constitution, Article 1, § 10, cl. 3, in explicit terms, forbids any state of the Union from entering into any agreement or compact with another state without the consent of Congress. But with the consent of Congress, states as sovereigns, may enter into any compact or agreement as they deem necessary. The construction

and maintenance of bridges is among the class of interstate compacts to which Congress has consented. Delaware River Joint Toll Bridge Com. v. Colburn, 310 U.S. 419, 84 L. Ed. 1287, 60 S. Ct. 1039 (1940).

The differences between an interstate compact and the instant case are obvious. A compact presupposes an important interest of the quasi sovereign, but the agreement in the instant case is granted no such presumption. Compacts by definition may be entered into only between states of the Union. Conversely, both West Virginia University and San Jose State University are free to, and do enter into agreements to play football games with privately chartered institutions. Additional distinctions would only belabor the self-evident. The fact that this Court

has granted original jurisdiction for a dispute with respect to an interstate compact is not precedent for extending the same opportunity for the dispute in the instant case.

Perhaps in recognition of this fact, California attempts to elevate the nature of the dispute by characterizing it as a question of whether or not one state may unilaterally rescind or break an agreement with another. Such a characterization is overbroad and contrary to the facts.

California has failed to inform the Court that the original agreement included an escape clause that allowed either party to withdraw from the agreement upon the occurrence of prescribed circumstances. West Virginia chose to invoke the escape clause upon the determination that in the six-year

interval since the agreement was entered into, and while the agreement was still entirely executory, various factors had arisen which made the invocation of the escape clause a justified and proper act.

Rather than a resort by West Virginia to unilateral breach as an instrument of policy for dealing with a sister state, the controversy is a mundane disagreement over the somewhat ambiguous language of perfunctory agreement for a sporting event. Even in the most elaborately drafted contract, disputes as to interpretation can arise and such is the situation presented here. Contrary to the contention of California, this case does not involve a real threat to the area of harmonious relationship between the states.

CONCLUSION

This Court has not previously exercised original jurisdiction for an action of this nature. The plaintiff state has failed to show that this Court must, as a matter of absolute necessity, act to protect its interest, and that the interest sought to be protected is a significant interest of the quasi sovereign. An alternative forum is available in which California may seek redress of its claim.

It is respectfully requested that this Court deny California's motion for leave to file its complaint.

DATED: September 23, 1981

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald L. Darling, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the within Brief in Opposition to Plaintiff's Motion for Leave to File Complaint upon the State of California by depositing a true copy thereof in the United States Mail, first-class postage prepaid this 24th day of September, 1981, addressed to:

Honorable Edmund G. Brown, Jr.
Governor of the State of
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Donald L. Darling

DONALD L. DARLING

SUPREME COURT OF THE UNITED STATES

NO. 91, ORIGINAL

Statement setting forth the details of filing by depositing in the United States mail with first-class postage prepaid, Brief in Opposition To Plaintiff's Motion For Leave to File Complaint.

I, Donald L. Darling, a member of the Bar of the United States Supreme Court, hereby make this statement in accordance with Rule 28.2 of the Rules of the United States Supreme Court.

I do hereby state and certify that the foregoing Brief in Opposition To Plaintiff's Motion For Leave to File Complaint, in Action No. 91, Original, State of California v. State of West Virginia, was filed pursuant to Rule 28 of the Rules of the United States Supreme Court, by depositing sixty (60) copies in the United States Mail, first-class postage prepaid, and addressed to:

Alexander L. Stevas, Clerk
United States Supreme Court
Washington, D. C. 20543

on the 24th day of September, 1981.

Donald L. Darling
DONALD L. DARLING

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Gregg N. Bailey, a Notary Public for the aforesaid State and County, do hereby certify that Donald L. Darling, whose name is signed to the foregoing document, dated the 24 day of September, 1981, has acknowledged the same before me on this 24 day of September, 1981.

My commission expires October 5, 1989.

Gregg N. Bailey
Notary Public